UNITED STATES PATENT AND TRADEMARK OFFICE

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Ex parte PERRY ROBINSON MACNEILLE,
OLEG YURIEVITCH GUSIKHIN,
GARY STEVEN STRUMOLO, and BASAVARAJ TONSHAL

_____

Appeal 2015-003843[1]
Application 13/185,975[2]
Technology Center 3600

_____

Before SHEILA F. McSHANE, AMEE A. SHAH, and
MATTHEW S. MEYERS, *Administrative Patent Judges*.

MEYERS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's final
rejection of claims 1–6 and 16–20. We have jurisdiction under 35 U.S.C.
§ 6(b).

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[1] Our Decision references Appellants' Appeal Brief ("Br.," filed
September 4, 2014), the Examiner's Answer ("Ans.," mailed
December 17, 2014), and Final Office Action ("Final Act.," mailed June 10,
2014).
[2] Appellants identify Ford Global Technologies, LLC as the real party in
interest (Br. 2).

We AFFIRM.

CLAIMED INVENTION

Appellants' claims relate generally to methods "for managing a content stream" (Spec. ¶ 1).

Claims 1 and 16 are the independent claims on appeal. Claim 1, reproduced below with minor formatting changes and added bracketed notations, is illustrative of the subject matter on appeal:

> 1.   A computer-implemented method comprising:
> [a] receiving a media request from a vehicle computing system (VCS);
> [b] aggregating user, environmental or vehicle data elements;
> [c] requesting a media plan, based on the aggregated data elements, from each of a plurality of media content providers;
> [d] selecting a plan, via a computer, from plans received from the media content providers responsive to the request, that best corresponds to the data elements; and
> [e] sending the selected plan to the VCS.

REJECTIONS

Claims 1–6 are rejected under 35 U.S.C. § 103(a) as unpatentable over Dollar (US 2010/0312369 A1, pub. Dec. 9, 2010), Michmerhuizen (US 2007/0233725 A1, pub. Oct. 4, 2007), and Ben-Yaacov (US 2010/0325022 A9, pub. Dec. 23, 2010).

Claims 16 and 17 are rejected under 35 U.S.C. § 103(a) as unpatentable over Dollar, Michmerhuizen, Ben-Yaacov, and Pudar (US 8,055,540 B2, iss. Nov. 8, 2011).

Claim 18 is rejected under 35 U.S.C. § 103(a) as unpatentable over
Dollar, Michmerhuizen, Ben-Yaacov, Pudar, and Chutorash
(US 2010/0280956 A1, pub. Nov. 4, 2010).

Claim 19 is rejected under 35 U.S.C. § 103(a) as unpatentable over
Dollar, Michmerhuizen, Ben-Yaacov, Pudar, and Belwadi
(US 2009/0222341 A1, pub. Sept. 3, 2009).

Claim 20 is rejected under 35 U.S.C. § 103(a) as unpatentable over
Dollar, Michmerhuizen, Ben-Yaacov, Pudar, and Weber
(US 2005/0024189 A1, pub. Feb. 3, 2005).

Claims 1–6 and 16–20 are rejected under 35 U.S.C. § 101 as directed
to non-statutory subject matter.[3]

ANALYSIS

Obviousness

Independent claim 1 and dependent claims 2–6

We are persuaded the Examiner erred in asserting that a combination
of Dollar, Michmerhuizen, and Ben-Yaacov discloses or suggests "selecting
a plan, via a computer, from plans received from the media content
providers responsive to the request, that best corresponds to the data
elements," as recited by limitation [d] of independent claim 1 (Br. 5–6).

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[3] The Examiner entered this rejection as a new ground in the Answer (*see*
Ans. 3). Appellants do not respond to the Examiner's new ground with a
Reply Brief, as required by 37 C.F.R. § 41.39(b), to maintain appeal.
However, in the interest of efficiency, we will address the issue of
patentability here and designate our response to patent eligibility as a new
ground.

The Examiner maintains the rejection is proper, and relies on Dollar, at paragraphs 15 and 31–43, and Figures 1–3 (*see* Ans. 10–11; *see also* Final Act. 4), as well as Ben-Yaacov, at paragraph 125 and Figure 14 (*see* Ans. 12; *see also* Final Act. 4–5), for disclosure of the argued limitation.

Dollar is directed to a system for "for generating an adaptive playlist on a computing device onboard a vehicle" (Dollar ¶ 2). Dollar discloses that its "media player program **116** may include a media storage module **134** configured to store a plurality of media items **136**, a user preference module **138** having user media preferences **140**, a contextual data aggregator module **142** configured to receive dynamic contextual data **144** from the onboard vehicle data source **124**" (*id.* ¶ 8). Dollar discloses that "user media preferences **140** may be inputted by the user . . . via a feedback selector on graphical user interface **132**" (*id.* ¶ 13) and "[a]lthough user media preferences **140** are shown as stored on the user preference module **138**, the computing device **112** may alternately send a request to another computing device, server, or service for user media preferences and receive the user media preferences **140** responsive to such a request" (*id.* ¶ 14; *see also id.* ¶¶ 39–42). For example, Dollar discloses "while user input is not necessitated, in some embodiments, the user may specify via user input various parameters that affect the generation of the adaptive playlist, such as preferred criterion or online information sources for selecting media items for inclusion as contextual media items in the adaptive playlist" (*id.* ¶ 45).

Dollar also discloses that "contextual data **144** may further include one or more of weather information, location information, calendar information, time and date information, and vehicle information" (*id.* ¶ 16) and

> [b]y utilizing these types of contextual data, meaningful correlations between the historical listening patterns of the user, and the variety of conditions represented by the contextual data **144** may be determined, and new media items may be selected for inclusion in the adaptive playlist **150** based on these correlations, as described below.

(*Id.*). Dollar further discloses "the onboard vehicle data source **124** includes a vehicle clock **158** configured to output the time and date information. Time and date information may be used, for example, to correlate a user's historical listening preferences during certain times of the days, days of the weeks, dates, etc." (*id.* ¶ 17). Dollar still further discloses "the onboard vehicle data source **124** includes vehicle sensors **160** configured to detect one or more operating conditions of vehicle components **162**" (*id.* ¶ 18; *see also id.* ¶¶ 19–20). Dollar discloses "generating an adaptive playlist including a plurality of user playlist media items selected from a plurality of stored media items based on user media preferences" (*id.* ¶ 42) and may also "include selecting one or more contextual media items from the plurality of media items, based on the dynamic contextual data received from the onboard vehicle data source" (*id.* ¶ 42; *see also id.* ¶¶ 31–34).

Ben-Yaacov discloses that its system includes "a process of associating items of media with one another, as performed by content tracker **170**" (Ben-Yaacov ¶ 124). For example. Ben-Yaacov discloses

> [a]t step **1405** a consumer plays a movie on his set top box. At step **1410** the set top box requests associated media from the namespace mapper. At step **1410** the namespace mapper finds media associated with the movie, including inter alia songs from the movie and games relating to the movie characters. The namespace mapper may identify associated media based on various types of data.

(*Id.* ¶ 125; *see also id.* at Fig. 14).

After reviewing the cited portions of Dollar in combination with Ben-Yaacov, we agree with Appellants that there is nothing in the relied upon portions of Dollar and Ben-Yaacov that discloses or suggests the argued limitation (Br. 5–6). Although we agree with the Examiner that Dollar discloses "generating media plans, *based on the aggregated data elements*" (*see* Final Act. 3; *see also* Ans. 10–12); limitation [c] does not merely require "generating media plans"; but instead, requires "requesting a media plan, based on the aggregated data elements, from each of a plurality of media content providers," as recited by limitation [c], and then subsequently, "selecting a plan, via a computer, from plans received from the media content providers responsive to the request, that best corresponds to the data elements," as recited by limitation [d].

In response to Appellants' arguments (*see* Appeal Br. 5–6), the Examiner acknowledges

> [i]n another word, **a media plan** generated based on the aggregated data elements in Dollar's teaching is not resulted from "<u>requesting</u>". Also, Dollar has "generating a media plan based on the aggregated data elements from **each of a <u>plurality of media plan sources</u>" and "selecting a plan from plans received from media content sources**"; however, **Dollar** does not explicitly use the phrase" … from plurality of content providers".

(Ans. 12). And, to address this deficiency, the Examiner finds

> **Ben-Yaacov** is introduced to teach <u>only</u> the <u>general concept</u> of **requesting** a media plan from each of **a plurality of media content providers** and plans received from t**he media content providers (part of steps 3 and 4)** {At least fig. 14, especially para 0125 disclose requesting for media plans (e.g. songs, games) associated with e.g., the movie current playing (plays by the consumer/consumer interest) from cable providers, electronic

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programing guide providers, game developers or other content
providers (plurality of media content providers ...) }.

(Ans. 12). The difficulty with the Examiner's finding, as Appellants
point out, is that in Ben-Yaacov,

> there would be no plan to select, as the results from all of the
> content providers are assembled into a single list. Selecting a
> plan "that best corresponds to the data elements" is simply not
> possible, because there is no plurality of plans (or even a single
> plan) returned, from which to select, or make such a comparison.

(Br. 6). And, although we agree with the Examiner that "'a media
plan/playlist' is so broad that it reads on 'Ben-Yaacov's teaching of 'songs'"
(Ans. 14), we fail to see, and the Examiner does not adequately explain how,
Ben- Yaacov's disclosure regarding "a list of the associated media found at
step **1415**" (Ben-Yaacov ¶ 126) and "[a]t step **1430** the consumer proceeds
to purchase a song, included in the associated media (*id.*) discloses or
suggests "selecting a plan, via a computer, from plans received from the
media content providers responsive to the request," as recited by limitation
[d] of independent claim 1.

In view of the foregoing, we do not sustain the Examiner's rejection
of independent claim 1 under 35 U.S.C. § 103(a). For the same reasons, we
also do not sustain the Examiner's rejection of claims 2–6, which depend
therefrom.

Independent claim 16 and dependent claims 17–20

Independent claim 16 includes limitations similar to limitation [d] in
independent claim 1, and is rejected based on the same rationale applied
with respect to independent claim 1 (*see* Final Act. 7–11; *see also* Ans.
14–15). Thus, for the same reasons, we also do not sustain the Examiner's

rejections of independent claim 16 under 35 U.S.C. § 103(a), and of claims 17–20, which depend from independent claim 16.

Patent-eligible Subject Matter

The Supreme Court in *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014) identified a two-step framework for determining whether claimed subject matter is judicially-excepted from patent eligibility under §101. We analyze the claims using the two part analysis: 1) determine whether the claims are directed to an abstract idea; and 2) if an abstract idea is present in the claims, determine whether any element, or combination of elements, in the claims is sufficient to ensure the claims amount to significantly more than the abstract idea itself to transform the claims into a patent-eligible invention. *See id.* at 2355.

According to the Specification, the present invention relates to methods "for managing a content stream" (Spec. ¶ 1). The Specification acknowledges that "[n]umerous sources of 'infotainment' are available in a streaming and/or on-demand fashion" (*id.* ¶ 2; *see also id.* ¶35) and identifies that "when using a 'smart' streaming service such as PANDORA, a user will have a variety of preferences associated with a user identity" (*id.* ¶ 4). The Specification discloses that "[b]ased on these preferences, and feedback gathered with respect to delivered content, the delivery service will attempt to provide music that is custom tailored to the audio preferences of the user" (*id.*). The Specification observes "[a] media provider may be able to inline advertisements with content delivery, but this revenue is typically not shared with a vehicle manufacturer" (*id.* ¶ 35). The Specification further observes that

> [t]he vehicle manufacturer, however, may have access to a much greater store of knowledge with respect to a particular consumer, and may be able to add value to selection of particular advertisement delivery. Of course, a large portion of the incentive to do so would come from the manufacturer's ability to subsequently share in the advertising revenues.

(*Id.* ¶ 36).

To address this problem, the Specification identifies "a computer-implemented method includes receiving a request for media playback sent from a vehicle computing system (VCS) and aggregating a plurality of user, environmental and vehicle data elements for at least one known consumer in a vehicle to receive media" (*id.* ¶ 6). The Specification further identifies "requesting media plans from a plurality of media provision sources, the plan based at least in part on the aggregated user, environmental and vehicle data elements" (*id.* ¶ 7) and "reviewing the media plans to select a plan received responsive to the request that best corresponds to the user, environmental and vehicle data elements" (*id.*). The Specification also identifies "receiving a request relating to an advertisement played in conjunction with a media stream" (*id.* ¶ 8).

Independent claim 1 is directed to "[a] computer-implemented method" and includes steps for "receiving a . . . request," "aggregating . . . data elements," "requesting a . . . plan, based on the aggregated data elements, from each of a plurality of . . . providers," "selecting a plan . . . from plans received from the . . . providers . . . that best corresponds to the data elements," and "sending the selected plan" (Claims App. 1). Independent claim 16 includes similar steps, but also includes steps for monetizing the "request" received in independent claim 1, by for

example, requiring "a user-input request responsive to the at least one advertisement" prior to "processing the user request" (Claims App. 2).

In that context, the claims are directed to providing media plans/playlists that best correspond to data elements.[4] Our reviewing courts have held certain fundamental economic and conventional business practices, like using advertisement as currency (*see Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 713 (Fed.Cir.2014)), intermediated settlement (*see Alice*, 134 S. Ct. at 2356–57), and tailoring information presented to a user based on particular information (*see Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1370 (Fed. Cir. 2015); *see also Bascom Glob. Internet Svcs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1348 (Fed. Cir. 2016)), as being abstract ideas. Thus, we find that the providing of media plans/playlists corresponding to data elements of independent claim 1 and the providing of media plans/playlists that correspond to data elements in response to an advertisement of independent claim 16 are similar to these abstract ideas; thus, we determine that independent claims 1 and 16 are directed to an abstract idea.

Turning to the second step of the *Alice* analysis, because we find that independent claims 1 and 16 are directed to an abstract idea, the claims must include an "inventive concept" in order to be patent-eligible, i.e., there must

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[4] We note the Examiner finds "independent claims 1 and 16 are directed to the abstract idea of mainly selecting a plan from plans received from the media content providers based on aggregated user data, environmental data or vehicle data elements and sending the selected plan to the user, wherein the plan includes at least one advertisement" (*see* Ans. 6). "[A]n abstract idea can generally be described at different levels of abstraction." *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240 (Fed. Cir. 2016).

be an element or combination of elements that is sufficient to ensure that the claim in practice amounts to "significantly more" than the abstract idea itself. Here, we find nothing in the claim elements, taken individually or as an ordered combination, which removes the claims from the class of patent ineligible subject matter.

In this regard, independent claims 1 and 16 include "a vehicle computing system (VCS)" and "a computer." However, these components merely recite generic computer elements, and "the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention." *Alice* 134 S. Ct. at 2358. We note that nothing in either independent claims 1 or 16 purports to improve computer functioning or "effect an improvement in any other technology or technical field." *Alice*, 134 S. Ct. at 2359. The Specification supports this view (*see* Spec. ¶¶ 21– 22, 34–35, and 52–53). Nor do the claims solve a problem unique to the Internet. *See DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014). Dependent claims 2–6 and 17–20 also add nothing significantly more to the patent-ineligible concepts recited in independent claims 1 and 16. Instead, these claims merely specify further details of the data aggregated in the independent claims.

Therefore, because independent claims 1 and 16 are directed to an abstract idea and nothing in the claims add an inventive concept, and dependent claims 2–6 and 17–20 do not add more, we find the claims are not patent-eligible under § 101.

In view of the foregoing, we sustain the Examiner's rejection of claims 1–6 and 16–20 under 35 U.S.C. § 101. Because our rationale differs

from that set forth by the Examiner, we denominate this a new ground of rejection.

DECISION

The Examiner's rejections of claims 1–6 and 16–20 under 35 U.S.C. § 103(a) are reversed.

The Examiner's rejection of claims 1–6 and 16–20 under 35 U.S.C. § 101 is affirmed. Insofar as our rationale differs from that set forth by the Examiner, we denominate this a new ground of rejection.

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). Section 41.50(b) provides that "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review." Section 41.50(b) also provides

> When the Board enters such a non-final decision, the appellant, within two months from the date of the decision, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:
>
> (1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new Evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the Examiner. The new ground of rejection is binding upon the examiner unless an amendment or new Evidence not previously of Record is made which, in the opinion of the examiner, overcomes the new ground of rejection designated in the decision. Should the examiner reject the claims, appellant may again appeal to the Board pursuant to this subpart.
>
> (2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record. The request for rehearing must address any new ground of rejection and state with particularity the points believed to have been

misapprehended or overlooked in entering the new ground of rejection and also state all other grounds upon which rehearing is sought.

Further guidance on responding to a new ground of rejection can be found in the *Manual of Patent Examining Procedure* § 1214.01.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

<u>AFFIRMED; 37 C.F.R. § 41.50(b)</u>